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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JON E. EDMOND, PETITIONER

*v.*

THE UNITED STATES OF AMERICA, RESPONDENT

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

## PETITION FOR A WRIT OF CERTIORARI

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48 pp

## QUESTION PRESENTED

Whether the Secretary of Transportation has authority to appoint the judges of the Coast Guard Court of Criminal Appeals under a general statute concerning the appointment of officers and employees of the Department of Transportation when the Uniform Code of Military Justice unconstitutionally places the authority to appoint those judges in the Judge Advocate General of the Coast Guard.

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JON E. EDMOND, PETITIONER

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THE UNITED STATES OF AMERICA, RESPONDENT

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces**

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# PETITION FOR A WRIT OF CERTIORARI

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The petitioner, Jon E. Edmond, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Armed Forces entered in this proceeding.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces, *United States v. Edmond*, 41 M.J. 419

(1995) is reprinted as Appendix A at App. 1a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Edmond*, 37 M.J. 787 (C.G.C.M.R. 1993), is reprinted as Appendix B at App. 11a.

## JURISDICTION

The decision of the Court of Appeals for the Armed Forces was issued on February 28, 1995. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant provision of the Uniform Code of Military Justice, Article 66, 10 U.S.C.A. § 866 (West 1995), provides in pertinent part:

> (a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of

one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State.

* * *

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

The relevant provision of Title 49 of the United States Code, 49 U.S.C. § 323(a) (1988), provides:

The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

## STATEMENT OF THE CASE

Petitioner was a Fire Control Technician Third Class (pay grade E–4), U.S. Coast Guard, at the time of his court–martial. He was tried by a general court–martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of several violations of the Uniform Code of Military Justice (UCMJ). His approved sentence consists of confinement for one year, forfeiture of all pay and allowances, reduction to the lowest enlisted grade (E–1), and a bad–conduct discharge. Both the Coast Guard Court of Military Review and the U.S. Court of Appeals for the Armed Forces affirmed his conviction and sentence. App. 11a, 1a.

### *A. Background*

Knowledge of three military cases is necessary to a full understanding of the issue presented in this case. Those cases are *Weiss v. United States*, 114 S. Ct. 752 (1994), *aff'g* 36 M.J. 224 (C.M.A. 1992); *United States v. Carpenter*, 37 M.J. 291 (C.M.A.), *petition for cert. filed*, 62 U.S.L.W. 3411 (U.S. Oct. 29, 1993)(No. 93–676); and *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994), *cert. granted*, 115 S. Ct. 713 (U.S. Jan. 6, 1995)(No. 94–431).

In *Weiss*, this Court affirmed the decision of the Court of Military Appeals[1] which had affirmed the Petitioner's conviction. The case involved a contention that the appointments of the military trial and appellate judges who

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[1] Effective October 5, 1994, the name of the U.S. Court of Military Appeals was changed to the U.S. Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, § 924, 108 Stat. 2663, 2831 (1994).

heard and reviewed the petitioner's case had not been made in compliance with the Appointments Clause of the Constitution. *Weiss*, 114 S. Ct. at 754–755; 36 M.J. at 225. This Court concluded that the Appointments Clause applied to the appointment of military trial and appellate judges, but that appointment as a commissioned officer of the armed forces, with the advice and consent of the Senate, satisfies the Appointments Clause for those judges who are commissioned officers on active duty. *Weiss*, 114 S. Ct. at 757, 760. However, the Court specifically declined to apply that conclusion to the appointment of civilians to service courts of military review. *Weiss*, 114 S. Ct. at 757 n.4. The Court noted that the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. § 866(a). It is not at issue here." *Id.*

On January 15, 1993, after the decision of the Court of Military Appeals in *Weiss*, the Secretary of Transportation signed a memorandum which "adopted" the prior appointments of the Coast Guard Court of Military Review judges as "appointments of [his] own." *See Carpenter*, 37 M.J. at 300. This memorandum was prepared and signed by the Secretary upon the suggestion of the judges of the Coast Guard Court of Military Review. *United States v. Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Military Appeals considered the issue of the appointment of civilian Court of Military Review judges. *Carpenter*, 37 M.J. at 293. Judge Gierke authored the opinion of the court. Relying on the Court of

Military Appeals decision in *Weiss*,[2] he first concluded that the military judge who tried Carpenter's case and two of the three Coast Guard Court of Military Review judges (the two who were commissioned officers on active duty) who reviewed the case were appointed consistently with the Appointments Clause. *Carpenter*, 37 M.J. at 293. However, with respect to the third member of the Court of Military Review panel in the *Carpenter* case, Chief Judge Baum, who is a civilian, the *Weiss* decision was not controlling.

The court correctly concluded that Chief Judge Baum's appointment to the court of military review was defective. *Carpenter*, 37 M.J. at 295. However, the court concluded that no relief was necessary, and it afforded *de facto* validity to the acts of the Chief Judge, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976). The court also noted the January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum, and suggested that this corrected the violation of the Appointments Clause. *Carpenter*, 37 M.J. at 295 and 294 n.1.

The issue of the propriety of affording *de facto* validity to the acts of unconstitutionally appointed appellate military judges who reviewed a criminal case is currently pending before this Court in *Ryder*. The Court of Military Appeals disposed of the issue of the validity of the appointments of the appellate military judges in a footnote, relying on its decision in *Carpenter*. *Ryder*, 39 M.J. at 455 n.*. This Court granted *certiorari* of the issue of appropriate relief for the violation of the Appointments Clause. *Ryder*, *cert. granted*, 115 S. Ct. 713 (U.S. Jan. 6, 1995)(No. 94-431)(oral argument held on April 18, 1995).

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[2] *Carpenter* was decided by the Court of Military Appeals before this Court's decision in *Weiss*.

Both *Carpenter* and *Ryder* were decided by the Coast Guard Court of Military Review before January 15, 1993. Therefore, the validity of the memorandum of the Secretary of Transportation issued on that date which purports to appoint the judges of the Coast Guard court was not at issue, and the comment in *Carpenter* suggesting its validity was simply dicta.

### *B. Petitioner's Appeals*

Petitioner's court-martial was reviewed by a panel of three judges of the Coast Guard Court of Military Review. The panel was composed of Chief Judge Baum, a civilian, and Judges Bastek and Edwards, active-duty commissioned officers. App. 11a. The court's decision in the case was issued on June 25, 1993, well after the Secretary's appointing memorandum. The Coast Guard court affirmed Petitioner's convictions after considering issues alleging denial of a speedy trial, disqualification of the military judge, multiplicious charges, failure of certain charges to state offenses, admission of irrelevant evidence, and failure to prove certain charges. App. 12a. In addition, the court rejected an issue concerning the constitutionality of the appointments of the judges. App. 32a.

On further discretionary appeal to the Court of Military Appeals, the court agreed to consider only the issues of speedy trial and the appointments of the judges. App. 2a. The court disposed of the Appointments Clause issue in a footnote, relying on its decision in *Carpenter*. *Id*.

## REASONS FOR GRANTING THE WRIT

### THE SECRETARY OF TRANSPORTATION HAS NO INHERENT AUTHORITY TO APPOINT THE APPELLATE MILITARY JUDGES, AND THE STATUTE RELIED UPON BY THE GOVERNMENT TO JUSTIFY THESE APPOINTMENTS IS INAPPLICABLE.

This case presents an important unanswered question concerning the authority of the Secretary of Transportation to make appointments to the Coast Guard Court of Criminal Appeals.

The Appointments Clause of the Constitution permits heads of departments to appoint inferior officers only when Congress has so permitted "by Law." U.S. Const. art. II, § 2, cl. 2. If Congress does not specifically, by law, vest the power to appoint inferior officers to a specific office, then those officers fall into the category of "all other officers of the United States, whose Appointments are not herein otherwise provided for . . .." *Id.* Under the Appointments clause, the authority to make those appointments would then fall to the President, with the advice and consent of the Senate. Similarly, if Congress provides by law for the appointment of an officer, but does so in an unconstitutional manner, that provision has no effect, and the residual appointment power of the President with the advice and consent of the Senate applies. *Id.*; *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209 (1865). There is no inherent authority in the head of a department to make appointments of officers in the department. *United States v. Perkins*, 116 U.S. 483 (1886).

Therefore, the Secretary of Transportation cannot rely upon any inherent authority as the head of the department to

appoint the judges of the Coast Guard Court of Criminal Appeals. Statutory authority is required, and it must be reasonably specific. *See Cain v. United States*, 73 F. Supp. 1019, 1021 (1947).

The statute relied upon by the Government to support the Secretary's appointments here, 49 U.S.C. § 323(a), is not specific, and is overly broad.[3] By its terms, it would appear to permit the Secretary of Transportation to appoint *all* other officers of the department. Appointment of other principal officers of the department is not excluded, and would apparently be permitted by this statute. However, this would clearly be a violation of the Appointments Clause.[4]

The overbreadth of the statute is also apparent when one considers the several other statutory provisions that relate to

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[3] The Secretary's appointing memorandum itself refers to no legal authority whatsoever for the Secretary's action. *Carpenter*, 37 M.J. at 300. However, 49 U.S.C. § 323(a) has been relied upon by the Government and the Court of Military Review. *Senior*, 36 M.J. at 1017.

[4] The question of whether the judges of the Courts of Criminal Appeals are principal or inferior officers is not clearly settled. Using a functional analysis approach as in *Morrison v. Olson*, 487 U.S. 654 (1988), there is a strong argument to be made that they are principal officers. *Contra Weiss*, 114 S. Ct. at 763–769 (Souter, J., concurring). They have very broad authority, similar to that of U.S. Court of Appeals judges, in the cases they review, with the additional power and duty to find facts and consider the appropriateness of the sentence themselves. Art. 66(c), UCMJ, 10 U.S.C. § 866(c). They have authority under the All Writs Act to issue extraordinary writs. 28 U.S.C. § 1651(a); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Their decisions are reviewable only by the Court of Appeals for the Armed Forces and this Court. The only limitation on their judicial powers is that it extends only to military justice cases, but it is extremely broad within that arena. If the judges of the Coast Guard Court of Criminal Appeals are principal officers, the Secretary of Transportation clearly cannot appoint them.

appointments of inferior officers of the department. For example, 49 U.S.C. § 102(e) permits the Secretary to appoint the Assistant Secretary for Administration; 49 U.S.C. § 104(b)(2) permits the Secretary to appoint the Deputy Federal Highway Administrator; 49 U.S.C. § 104(b)(3) permits the Secretary to appoint the Assistant Administrator of the Federal Highway Administration; 49 U.S.C. § 105(b) permits the Secretary to appoint the Deputy Administrator of the National Highway Traffic Safety Administration. None of these provisions would be necessary if 49 U.S.C. § 323(a) meant precisely what it says. Thus, 49 U.S.C. § 323(a) apparently has an implied "unless otherwise provided by law" clause in it. The authority to appoint appellate military judges is otherwise provided for by law. Art. 66(a), UCMJ, 10 U.S.C. § 866(a). However, that specific provision is unconstitutional, at least as applied to the appointment of civilians. *Carpenter*, 37 M.J. at 294. As indicated *supra*, when Congress fails to specify how an officer is to be appointed, or provides for appointment in an unconstitutional manner, the method of appointment should be by the President with the advice and consent of the Senate.

Furthermore, Petitioner contends that the memorandum of the Secretary is of no effect because the well-settled rule of statutory interpretation is that, if two statutory provisions deal with the same subject, one is general in its application and the other specific, and the two provisions are in conflict, the specific provision is to be applied. 82 C.J.S. *Statutes* § 369 (1953); 73 Am. Jur. 2d *Statutes* § 257 (1974). That is exactly the situation involved here. The two statutes in question are Art. 66(a), UCMJ, 10 U.S.C. § 866(a), and 49 U.S.C. § 323(a). Both statutory provisions concern, at least in part, the appointment of officers of the United States within the Department of Transportation. One provision is general

and one specific in terms of appointment of officers. Article 66(a), UCMJ, is specific in that it addresses only the appointment of the judges of the Courts of Criminal Appeals; 49 U.S.C. § 323(a) is general in that it addresses the appointment powers of the Secretary generally, department-wide. The two provisions are in conflict. In Art. 66(a), UCMJ, Congress directed the service Judge Advocate General to appoint the judges of the service Court of Criminal Appeals. In 49 U.S.C. § 323(a), Congress authorized the Secretary of Transportation to appoint officers of the department generally, not specifically naming any particular officers or positions. Therefore, it is clear that the rules of statutory interpretation and application require that the specific provision, Art. 66(a), UCMJ, be given effect over the general provision, 49 U.S.C. § 323(a). Thus, Congress gave the power to appoint the judges of the Coast Guard Court of Criminal Appeals to the Judge Advocate General, and not to the Secretary.

## CONCLUSION

For the reasons stated, petitioner prays that this Court grant review of the question presented.

Respectfully submitted,

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## APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 93-1292

CMR No. 999

United States, Appellee

v.

Jon E. EDMOND, Fire Control Technician Third Class,

U.S. Coast Guard

Argued October 6, 1994

Decided February 28, 1995

41 M.J. 419

For Appellant: Lieutenant Commander Allen Lotz (argued).

For Appellee: Lieutenant John F. Koeppen (argued).

Opinion of the Court

CRAWFORD, Judge:

1. Contrary to his pleas, appellant was convicted of being an accessory after the fact to attempted sodomy, 3 bad-check offenses, and committing an indecent act, in violation of Articles 78 and 134, Uniform Code of Military Justice, 10 USC §§ 878 and 934, respectively. The convening authority approved the sentence of a bad-conduct discharge, confinement for 1 year, total forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and the sentence. 37 M.J. 787 (1993).

## GRANTED ISSUE[1]

## WHETHER THE MILITARY JUDGE ERRED BY FAILING TO DISMISS ALL CHARGES WITH PREJUDICE DUE TO LACK OF A SPEEDY TRIAL.

2. We hold the military judge did not abuse his discretion in failing to dismiss all charges with prejudice due to lack of speedy trial under RCM 707, Manual for Courts-Martial, United States, 1984 (Change 5).

## FACTS

3. On the evening of March 1, 1990, eight members of the United States Coast Guard Cutter HAMILTON, including appellant, rented a room at the Red Roof Inn in Philadelphia, Pennsylvania, for a going-away party for a fellow Coast Guardsman who was being transferred. The HAMILTON was undergoing repair work in Philadelphia. The group consisted of seven men and one woman, the woman being Seaman L. She became intoxicated after consuming almost a fifth of liquor. Several members of the group, including appellant, took advantage of her condition to engage in acts of sexual misconduct. The witnesses to these events both at the party and afterwards were in Philadelphia on temporary duty from various parts of the country, including Hawaii, Washington State, Oklahoma, New Jersey, Massachusetts, Virginia, as well as members of the HAMILTON, which was en route to its new homeport in Long Beach, California, from June 21 to July 25, 1991.

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[1] We also granted review of 2 other issues, 39 M.J. 428 (1994), which have been disposed of by *United States v. Carpenter*, 37 M.J. 291 (CMA 1993), *cert. granted sub nom. Ryder v. United States*, 115 S. Ct. 713 (Jan. 6, 1995)(No. 94-431).

4. On June 25, 1991, charges were preferred against appellant for the following offenses:

(1) conspiring with Yeoman Martin R. Trujillo, Seaman Jose M. Collazo, and Seaman Charles A. Hokoana to rape, sodomize, and indecently assault Yeoman L.;

(2) conspiracy to obstruct justice by hindering the investigation of the rape, sodomy, and indecent assault of L;

(3) making a false official statement to Special Agent R. A. Carreiro that no one made any sexual advances against L at the Red Roof Inn in Philadelphia, Pennsylvania, on or about March 1, 1990;

(4) rape of L;

(5) forcible sodomy of L;

(6) indecent assault of L by inserting his finger into her vagina; and

(7) indecent assault of L by biting her about the neck, breast, and thighs.

5. Prior to arraignment (1), (4), and (5) were dismissed. Two accessory-after-the-fact specifications were added on November 18, 1991.

6. After an Article 39(a), UCMJ, 10 USC § 839(a), session, the military judge on December 21 dismissed without prejudice the aforementioned charges and specifications preferred on June 25, 1991, against appellant because of a denial of a right to speedy trial as set forth in RCM 707. On December 27, 1991, additional charges were preferred against appellant for conspiracy to obstruct justice, making a false official statement, and indecent assault.

7. On February 7, 1992, another Additional Charge and 3 specifications of uttering bad checks were preferred; on March 13, 1992, a fifth Additional Charge and its

specification were preferred alleging commission of an indecent act upon Seaman L. Appellant alleges that the indecent-act charge is in effect very similar to the indecent-assault charge which was dismissed without prejudice, Final Brief at 3, and we will treat it accordingly.

8. The prejudice alleged by the accused on appeal is that he was disenrolled from a service school, denied access to classified material, and was under great stress. Final Brief at 7.

## DISCUSSION

9. While articulating an "abuse of discretion" standard in *United States v. Taylor*, 487 U.S. 326, 335 ¶ 12 (1988), the Supreme Court stated that "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Id.* at 336 ¶ 13. The Court continued: "Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise.... Factual findings of a district court are, of course, entitled to substantial deference and will be reversed only for clear error." *Id.* at 336 ¶ 14 and 337 ¶ 16. But the appellate court is to apply the "particular factors" set forth in the statute. *Id.* at 336-37 ¶ 15.

10. The Speedy Trial Act (18 USC §§ 3161-62) requires a reviewing court to undertake "substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute." In assessing these factors, "the district court's judgment of how opposing considerations balance should not lightly be disturbed." 487 U.S. at 337 ¶ 16.

11. RCM 707 was based on ABA Standards, Speedy Trial (1978), *see* Drafters' Analysis, Manual, *supra* at A21-

36, and is generally similar to 18 USC §§ 3161–62. The Rule was designed to ensure speedy-trial protections in addition to those granted by the Sixth Amendment, Due Process Clause of the Fifth Amendment, and Article 10, UCMJ, 10 USC § 810. *United States v. Vogan*, 35 M.J. 32, 33 ¶ 5 (CMA 1992). In *United States v. Kossman*, 38 M.J. 258, 262 ¶21 (CMA 1993), relying on Article 10, we set forth a "reasonable diligence" standard, citing *United States v. Tibbs*, 15 USCMA 350, 353, 35 CMR 322, 325 ¶ 8 (1965). But *Kossman* is not applicable here because there was no pretrial restraint of appellant.

12. This case marks the first time this Court has addressed the 1991 change to RCM 707 allowing dismissal without prejudice. That version of RCM 707(d) provides:

> A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

13. This provision is similar to 18 USC § 3162(a)(2) of the Federal Speedy Trial Act, which reads:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among

> others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice....

14. One of the differences between the Speedy Trial Act and RCM 707 is that the factor of "prejudice to the accused resulting from the denial of a speedy trial" set out in the Rule is not enumerated in the Speedy Trial Act. However, in *United States v. Taylor*, 487 U.S. at 333–34 ¶ 10, the Court pointed out that the legislative history reveals that prejudice to the accused is a factor to be taken into account.

15. In assessing whether there has been a violation of the Sixth Amendment right to a speedy trial, courts examine the "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 ¶ 24 (1972). In contrast to the Speedy Trial Act, RCM 707(d) explicitly provides that if the judge does find a violation of the Sixth Amendment right to a speedy trial, the sole remedy is dismissal. *See United States v. Strunk*, 412 U.S. 434 (1973). Neither the dismissal with prejudice nor without prejudice has a "priority" in the Speedy Trial Act. *United States v. Taylor*, 487 U.S. at 334 ¶ 11.

16. In determining whether the motion should have been granted with prejudice, the Supreme Court announced that it would examine the following factors: "truly neglectful" government "attitudes"; intentional versus "isolated unwitting violation[s]"; excuses for the delay; and responsibility for the delay. *Id.* at 338–39 ¶ 18. The Federal Courts have looked at similar factors, such as "intentional dilatory conduct," *United States v. Kottmyer*, 961 F.2d 569, 573 ¶ 18 (6th Cir. 1992); a "pattern of neglect," *id.* at 573 ¶ 18 and *United States v. Giambrone*, 920 F.2d 176, 182 (2d Cir. 1990); and simple

inadvertence, *United States v. Wright*, 6 F.3d 811, 814 ¶ 12 (D.C. Cir. 1993).

17. A review of the record reveals that the 176-day delay in this case was not due to "intentional dilatory conduct" on the part of the Government. After the party at the Red Roof Inn, the witnesses and suspects were spread throughout the world, including California, Hawaii, Oklahoma, and many places on the East Coast. In fact, prior to preferral of charges appellant's ship sailed from Boston to Long Beach, California, making potential witnesses and the co-accuseds unavailable. Twenty-eight days of the delay were due to finding a "suitable" investigating officer for a multi-party Article 32, UCMJ, 10 USC § 832, investigation. This involved contacting 7 different Coast Guard legal offices to find an Article 32 investigating officer. Another delay between August 26 and September 19, 1991, was to await the trials of the co-accused to obtain further evidence for appellant's trial. Certainly it is reasonable for the Government to decide in which order defendants will be tried. *Cf. United States v. Facey*, 26 M.J. 421 (CMA 1988); *United States v. Grom*, 21 M.J. 53, 57 ¶ 14 (CMA 1985), *cert. denied*, 475 U.S. 1083 (1986).

18. Appellant demanded a speedy trial on August 27, 1991, after a multi-party Article 32 investigation. The military judge evaluated the seriousness of the offenses; the facts and circumstances surrounding the request for dismissal; the reasons for the delays; and the prejudice to the accused. He found very little prejudice to appellant, *i.e.*, disenrollment from school, inability to work due to withdrawal of his security clearance, and possible stress. There was no indication of the slightest impact on the right to a fair trial.

19. Based on these facts, we hold that the military judge did not abuse his discretion in failing to dismiss the charges with prejudice.

The decision of the United States Coast Guard Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and GIERKE concur.

WISS, Judge (concurring in the result):

20. The majority asserts: "A review of the record reveals that the 176-day delay in this case was not due to 'intentional dilatory conduct' on the part of the Government." 41 M.J. at 422. It then notes that this record reveals that there was difficulty in contacting potential witnesses and co-accuseds who had "spread throughout the world" after the party; difficulty in finding a suitable Article 32, Uniform Code of Military Justice, 10 USC § 832, officer; and the need to obtain further evidence for appellant's trial by waiting for the trial of co-accused. My own review of the record, however, does not support the implication that such facially understandable explanations caused the delay here, so I cannot join in the majority opinion.

21. The party at which these offenses allegedly occurred was on *March 1, 1990*, in Philadelphia, where the revelers' ship was in overhaul. Investigation of this event began at least as early as April 1990. On June 21, 1991, nearly 16 months after the party, the ship left the east coast, and it arrived at its new homeport of Long Beach, California, on July 25, 1991. The original charges had been preferred against appellant, in the interim, on June 25, 1991, thereby starting the 120-day clock of RCM 707(a)(1), Manual for Courts-Martial, United States, 1984.

22. On *September 9, 1991*, the Government asked for and received the convening authority's retroactive excusal for delay since June 25. The military judge, however, ruled that

excusing this delay was an abuse of the convening authority's discretion in violation of RCM 707(c), which only provides for "prospective grants of pretrial delay" in all cases tried after July 6, 1991. Exec. Order No. 12767, 56 Fed. Reg. 30299 (1991). *See United States v. Carlisle*, 25 M.J. 426 (CMA 1988). As well, this request and grant of excusal was *ex parte*--another violation of RCM 707 found by the military judge. *See United States v. Duncan*, 38 M.J. 476, 479 ¶ 15 (CMA 1993).

23. It was during this period of delay that the alleged difficulties arose to which the majority points. Upon a closer look, however, those difficulties do not appear to have been so overwhelming. As mentioned earlier, the investigation into the events at the party had begun in April 1990; in fact, the Government had given immunity to one of the attendees and had interviewed him in November 1990. Further, the witnesses and co-accused numbered only a total of eight, and all were servicemembers. In this context, it is not readily apparent that the task of locating and interviewing these eight people was so imposing, as the majority implies. As to the tactical decision to try appellant after 2 of his co-accused I note simply that neither testified at appellant's court-martial when it finally took place in March 1992.[2]

24. Thus, the delay from *September 23 until November 18, 1991*, is wholly unexplained; the prosecutor simply asserted that he believed that the convening authority had relieved the Government of accountability for 91 days of delay on September 9 (77 days as of that date and 14 more

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[2] The military judge dismissed the relevant charges without prejudice to the Government to renew them in December 1991. Ironically, then, appellant's motion to dismiss charges due to unreasonable pretrial delay only resulted in 3 more months of delay.

prospectively)--the implication being that trial counsel believed (erroneously, it turned out) that he had time to burn.

25. Accordingly, far from being a picture of orderly process interrupted only by reasonable and understandable difficulties, as painted by the majority, this case is a not pretty picture of a lackadaisical approach to military justice. I do not dissent from the majority's disposition here only because appellant is unable to point convincingly to substantial prejudice suffered as a result. *See* RCM 707(d); *United States v. Grom*, 21 M.J. 53, 57 ¶¶ 16–17 (CMA 1985), *cert. denied*, 475 U.S. 1083 (1986). The Government has dodged a bullet.

## APPENDIX B

U.S. COAST GUARD COURT OF MILITARY REVIEW

CGCM 0063

Docket No. 999

UNITED STATES

v.

Jon E. EDMOND, Fire Control Technician Third Class,

U.S. Coast Guard

25 June 1993

37 M.J. 787

Trial Counsel: LCDR C. H. Allen, USCG

Detailed Defense Counsel: CAPT G. J. D. Dean, USMC

Assistant Defense Counsel: LT J. R. James, JAGC, USNR

Appellate Defense Counsel: LCDR Allen Lotz, USCG

Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE PANEL FOUR, BAUM, BASTEK, and EDWARDS, Appellate Military Judges.

EDWARDS, Judge:

Contrary to his pleas, Appellant was convicted by officer and enlisted members of being an accessory after the fact to an attempted sodomy committed by a shipmate,

committing an indecent act with a different shipmate, and dishonorably failing to maintain sufficient funds in his checking account to honor each of three personal checks, in violation of Articles 78 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 878 and 934 (Supp. II 1990). The convening authority approved the adjudged sentence of reduction to pay grade E–1, forfeiture of all pay and allowances, confinement for one year, and a bad conduct discharge.

Appellant submits ten assignments of error, six of which merit discussion. Those six follow: Assignment I asserts that the Military Judge erred in not dismissing all charges with prejudice for lack of a speedy trial. Assignment II asserts that the Military Judge erred in denying a defense motion which sought his disqualification. Assignment III asserts that the Military Judge erred in refusing to dismiss Additional Charge V and its specification (indecent act with another), when it was multiplicious for pleading purposes with Additional Charge III and its specification (indecent assault). Assignment IV asserts that the three specifications of failing to maintain sufficient funds fail to state offenses. Assignment V asserts that the Military Judge erred in admitting irrelevant evidence of the post–offense status of Appellant's checking account. Assignment VI asserts that the evidence was not sufficient to prove beyond a reasonable doubt that Appellant was guilty of dishonorably failing to maintain sufficient funds in his checking account.

The case having been fully briefed and argued, we now affirm.

## I.

## FACTS

The most serious charges arose from an incident which occurred on 1 March 1990. Appellant was assigned to USCGC HAMILTON (WHEC-715), which was undergoing a period of yard availability in Philadelphia, Pennsylvania. A going-away party was held in a local motel for one of Appellant's shipmates who was being transferred. During the party, Seaman (SN) L, a woman who served with Appellant in the cutter's deck force, consumed so much alcohol that she became quite ill. Several of the party-goers, including Appellant, took advantage of SN L's inebriated and sickened condition to engage in acts of sexual misconduct. Ultimately, the incident came to the attention of Coast Guard authorities, was investigated, and led to charges. Following dismissal of most of the charges by the Military Judge at the initial session of Appellant's trial, *see* Part II *infra*, Appellant issued three personal checks which were dishonored and thereafter served as the basis for an additional charge when the trial reconvened.

## II.

## SPEEDY TRIAL

Charges under Articles 81, 107, 120, 125, and 134, UCMJ, initially were preferred against Appellant on 25 June 1991, and he was informed of them on 5 July 1991. *See* Rules for Courts-Martial [hereinafter R.C.M.] 308. No pretrial restraint, R.C.M. 304, was imposed. An additional charge under Article 78, UCMJ, containing two specifications, was preferred on 18 November 1991. An Article 32, UCMJ, hearing was conducted on 18 and 19 November 1991. Thereafter, the Convening Authority

referred charges under Articles 78, 81, 107, and 134, UCMJ, to a general court-martial. Trial commenced on 18 December 1991. Prior to arraignment,[1] Appellant moved to dismiss all

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[1] R.C.M. 904 provides, in pertinent part, that arraignment "shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." The Discussion following R.C.M. 904 notes that "arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."

During the first session of Appellant's trial on 18 December 1991, the Military Judge stated to Appellant:

> Now Petty Officer Edmond, I'm about to ask you how you plead to the Charges and Specifications. However before receiving pleas, I must advise you that any motions to dismiss any charge or to grant any other relief should be made at this time. I understand that Captain Dean [Detailed Defense Counsel] has several motions to make at this point. You may proceed.

Record at 20.

Thereafter, motions were made and argued extensively. However, Appellant never actually was asked to plead nor did he do so on that date. Accordingly, there was no arraignment on 18 December 1991.

Trial reconvened on 23 March 1992. In the meantime, as discussed *infra*, the Military Judge had dismissed the charges under Articles 81, 107, 120, 125, and 134, which were the ones preferred on 25 June 1991. The additional charge under Article 78, UCMJ, which had been preferred on 18 November 1991, was not affected. New charges had been preferred and referred to the same court-martial. The Military Judge correctly explained to Appellant that he could not be tried on the new charges without his consent. *See* R.C.M. 601(e)(2). Appellant so consented and was arraigned properly on all of the charges, including the charge under Article 78, UCMJ.

Between 18 November 1991 and Appellant's arraignment on 23 March 1992, 126 days elapsed. As he had not been arraigned at the 18 December 1991 trial session, a motion for dismissal of the Article 78, UCMJ, charge might have been made by Appellant under R.C.M. 707(a)(1) and

of the charges on the basis of denial of his right to a speedy trial.

In his Essential Findings and Ruling on Speedy Trial Motion, dated 21 December 1991, the Military Judge found the government accountable for 161 days of the 176 days which had elapsed since charges originally had been preferred on 25 June 1991. Accordingly, he also found that the government had violated R.C.M. 707(a)(1), which provides that an accused is to be brought to trial within 120 days of the preferral of charges. He did not find a violation of Appellant's right to a speedy trial under either the Sixth Amendment to the Federal Constitution or Article 10, UCMJ. Pursuant to R.C.M. 707(d), the Military Judge dismissed the charges preferred on 25 June 1991 (Articles 81, 107, 120, 125, and 134, UCMJ), without prejudice to the government's right to reinstitute proceedings against Appellant for the same offenses. He denied that portion of the motion seeking dismissal of the additional charge under Article 78, UCMJ.

Appellant argues first that the Military Judge should have dismissed the additional charge under Article 78, UCMJ, because the government had the information necessary to prefer that charge when he was charged with the other offenses on 21 June 1991. Appellant cites *United States v. Boden*, 21 M.J. 916 (A.C.M.R. 1986), and *United States v. Honican*, 27 M.J. 590 (A.C.M.R. 1988), in support of his position. Both *Boden* and *Honican* are inapposite. In each, the accused was in pretrial confinement for other offenses

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[1] Cont. 707(b)(1). None was. It appears that no one realized that Appellant had not been arraigned at the session on 18 December 1991, and that all parties acted as though he had pled not guilty. In any event, while not condoning the failure to hold a proper arraignment, we find that Appellant has waived this issue. R.C.M. 905(e) and 907(b)(2).

when an additional charge was preferred. Under the version of R.C.M. 707(d) then in effect and *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), the Army Court of Military Review held that, as a consequence of being in pretrial confinement, the 90-day period for bringing the accused to trial on the additional charge began when the government possessed "substantial information on which to base preferral of that charge." *United States v. Boden*, 21 M.J. at 918. Unlike either of the accused in *Boden* and *Honican*, Appellant in this case never was placed in pretrial confinement. Accordingly, the condition predicate for starting the speedy trial clock, i.e., substantial information while Appellant was in pretrial confinement, never was satisfied.

Appellant next contends that, in dismissing the 21 June 1991 charges without prejudice, rather than with prejudice, the Military Judge abused his discretion because he did not weigh properly the factors listed in R.C.M. 707(d). Appellant also contends that, in any event, the lack of a speedy trial violated his Sixth Amendment rights.

Both the government and Appellant agree that the current version of R.C.M. 707 applies. It was included in Executive Order 12767 issued by the President on 27 June 1991 and published at 56 Fed. Reg. 30284, which subsequently was published as Change No. 5 to the Manual for Courts-Martial, United States 1984 [hereinafter MCM] on 15 November 1991. Section 4.d. of the Executive Order provides that the amended R.C.M. 707 was to apply "only to cases in which arraignment occurs on or after 6 July 1991." As arraignment occurred on 23 March 1992, *see* n.1 *supra*, we also agree that the current version applies.

R.C.M. 707(d) now provides:

> Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected

> charges. This dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

Recognizing that, if he found a violation of Appellant's constitutional right to a speedy trial, he would have no alternative but to dismiss with prejudice any of the affected charges, the Military Judge first conducted a "Sixth Amendment Speedy Trial" analysis. Citing *Barker v. Wingo*, 407 U.S. 514 (1972), *United States v. Grom*, 21 M.J. 53 (C.M.A. 1985), and *United States v. Johnson*, 17 M.J. 255 (C.M.A. 1984), the Military Judge addressed four factors, *viz.*, length of delay, reason for delay, Appellant's assertion of his right to a speedy trial, and prejudice to Appellant.

The Military Judge found the length of delay, 176 days, while beyond the 120-day standard of R.C.M. 707, to be "within the 'neutral' range for determining a 6th Amendment speedy trial violation."

With respect to reasons for delay, the government offered several, including unavailability of witnesses due to a coast-to-coast change of homeport of Appellant's cutter and the earlier trial of two co-accused in order to make them available to testify at Appellant's trial. Additionally, consistent with past practice under the former version of

R.C.M. 707, the Convening Authority had authorized several periods of pretrial delay, but did so retroactively. The Military Judge ruled that the current version of R.C.M. 707(c) precludes retroactive approval of periods of delay. Nevertheless, he found no bad faith on the part of government counsel because "this issue was *not* clearly settled" when the government counsel obtained retroactive approval for periods of delay from the Convening Authority. Accordingly, the Military Judge found that this factor "weigh[ed] in favor of the government in [his] balancing."

Appellant did demand a speedy trial on 27 August 1991 and the Military Judge found this factor to favor Appellant's position.

Finally, with respect to the fourth factor, prejudice to Appellant, the Military Judge found only "slight" prejudice, because Appellant had not been restrained in any fashion, there was no evidence that his defense had been hindered by the delay, he had continued to receive pay and allowances, and there was no significant evidence that Appellant's anxiety or stress exceeded that of any other accused facing similar charges. Appellant's security clearance had been withdrawn, but he had been allowed to perform the normal duties of a person in his rating who had lost such a clearance.

Upon weighing all of these factors, the Military Judge "[found] them less compelling than the factors evaluated by the Court of Military Appeals in [*United States v. Grom*, *supra*], where the court held that there was no denial of the 6th Amendment right to a speedy trial." Accordingly, the Military Judge found no Sixth Amendment violation.

We concur with the Military Judge's reasoning and his conclusion. Applying the abuse of discretion standard of *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987), we find that he did not abuse his discretion in denying that portion of

Appellant's speedy trial motion seeking dismissal under the Sixth Amendment.

Turning to the issue of dismissal with or without prejudice, we note that the Military Judge's essential findings also addressed each of the four specially listed factors in R.C.M. 707(d). With respect to the first, seriousness of the offenses, the Military Judge found that Appellant had been charged with what clearly were serious offenses. As to the second, the facts and circumstances of the case that led to dismissal, the Military Judge found no evidence of intentional government noncompliance with R.C.M. 707, but instead a "good faith, though misguided, reliance on an erroneous interpretation of [the] 'new' RCM 707." With respect to the third factor, the impact of a reprosecution on the administration of justice, the Military Judge found this to be "neutral," since dismissal with prejudice would not have contributed to a better or fairer administration of military justice within the Coast Guard. Finally, the Military Judge found that the fourth factor, prejudice to the accused, favored dismissal without prejudice since Appellant had not been harmed by the 41-day length of the R.C.M. 707 violation. Again, we find that the Military Judge did not abuse his discretion in deciding to dismiss without prejudice.

## III.

## DISQUALIFICATION OF THE MILITARY JUDGE

Appellant asserts that, pursuant to R.C.M. 902(a) and (b)(1), the Military Judge should have recused himself in order to avoid the "appearance of impartiality" (sic), because he had served as the military judge in the courts-martial of three of Appellant's co-accused.

At trial, Appellant twice challenged the Military Judge for cause, at the initial session on 18 December 1991, and the

second session on 23 March 1992. In both instances the Military Judge denied the challenge. He explained that he had no knowledge of any of the facts concerning any of the accused except that which was gained during his participation in their earlier trials. Anything which he had heard in a prior case he always disregarded in a subsequent trial, and he intended to do the same in Appellant's trial. Finally, the Military Judge stated that any determination he might make with respect to Appellant would be based entirely upon evidence presented at his own trial.

Appellant argues for reversal because of the Military Judge's acceptance of a guilty plea by one of Appellant's co-accused to a charge of accessory after the fact to indecent assault by Appellant, and because of the "chilling effect" upon that same co-accused's testimony purportedly caused by the presence on the bench of the same military judge who had tried that co-accused.

The facts in this case most closely resemble those found in *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991). In *Oakley*, the military judge presided at a trial with members after he previously had presided at the trials of two of the accused's "alleged cohorts." *Id.* at 33. One had pled guilty in a trial by military judge alone, and the other had pled guilty in a trial with members. The Court of Military Appeals held that the military judge was not required to recuse himself where there was no "affirmative indication in the record that [the accused] would have withdrawn that request [for trial with members] if his recusal motion had been granted," *id.* at 34, the military judge's findings in the earlier trials were based upon evidence presented solely in those trials, and the military judge clearly demonstrated his intention and ability to disregard that other evidence and rely strictly upon evidence presented in the accused's trial.

With respect to forum, during *voir dire* of the Military Judge at the initial trial session, he asked Detailed Defense Counsel whether Appellant was considering trial by military judge alone. Defense Counsel declined to answer the question at that time. After the challenge against the Military Judge had been denied the first time, Appellant elected trial with members. Neither Appellant nor Detailed Defense Counsel made any statement to the effect that the denial of the challenge had led to the decision to go forward with members. Accordingly, as in *Oakley*, there does not appear to be any basis for concluding that the denial of the challenge to the Military Judge for cause had any effect on Appellant's choice of forum.[2]

We also conclude that there is no basis for finding that the Military Judge was any less than completely forthright in stating his belief that he could hear Appellant's case fairly and without regard to the earlier trials. This clearly is not a case in which the Military Judge had "formed an intractable opinion as to the guilt of the accused." *United States v. Winter*, 35 M.J. 93, 95 (C.M.A. 1992). Similarly, as "fundamental legal principles require judges to decide cases based on evidence presented at trial," *id.*, the Military Judge's assurances that he would do precisely this must be accorded great weight. We find no merit in Appellant's "chilling effect" argument because there is no evidence the Military Judge's participation in earlier trials had any untoward effect upon witnesses in Appellant's trial. This argument also fails because it is presumed that counsel had access to earlier

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[2] Even if Appellant had stated that the Military Judge's denial of his challenge had led him to elect trial by members, we are not convinced that this single change in the facts of this case would necessitate altering our decision on the issue of the Military Judge's disqualification.

testimony and would themselves have been aware of and quick to point out any witness inconsistencies from one trial to the next.

## IV.

## MULTIPLICITY OF CHARGES

The single specification under Additional Charge III alleges that Appellant committed an indecent assault under Article 134, UCMJ, against Yeoman Third Class L [SN L apparently had been advanced to Yeoman Third Class (YN3) by the time charges were preferred]. The single specification under Additional Charge V alleges the same facts as Additional Charge III but charges that Appellant committed an indecent act under Article 134, UCMJ, with YN3 L.

At trial, Detailed Defense Counsel moved to dismiss Additional Charge V as multiplicious with Additional Charge III, contending that the alleged indecent act was a lesser included offense of the alleged indecent assault. The government responded that Additional Charge V alleged a consensual indecent act while Additional Charge III alleged a nonconsensual indecent assault; that the case law was unclear whether a consensual indecent act could be found to be a lesser included offense of indecent assault; and that, based upon exigencies of proof, the members might find that SN L had consented to the acts allegedly committed by Appellant, rather than that she had been the victim of them.

The Military Judge denied Appellant's motion. He ruled that, although Additional Charge V was a lesser included offense of Additional Charge III, there was not an unreasonable multiplication of charges and that submitting both charges to the members as drafted would be clearer and less likely to lead to confusion on their part. He later

instructed the members twice about the distinctions between the two charges, both when he first informed them about the charges and again prior to deliberations. In giving the first set of instructions to the members, the Military Judge stated that Additional Charge V was a lesser included offense of Additional Charge III. He repeated this statement in the latter instructions and he also explained to the members that they were to vote on Additional Charge III first and to consider Additional Charge V only if they acquitted Appellant of Additional Charge III. In the event they convicted him of Additional Charge III, the members were neither to vote nor make any finding with respect to Additional Charge V. We test the denial of Appellant's motion to dismiss for abuse of discretion. *United States v. Howard*, 24 M.J. 897 (C.G.C.M.R. 1987).

The Discussion following R.C.M. 307(c)(4) provides that

> what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. . . . There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

For the purpose of deciding this issue, we shall assume that the Military Judge was correct in treating the alleged indecent acts charge as a lesser included offense of the indecent assault charge. *See* ¶ 63d.(2), Part IV, MCM.

The Military Judge made it as clear as possible to the members that the two charges grew out of one set of alleged circumstances, that the only significant distinction between them was that of consent on the part of SN L, and that they

could not convict Appellant of both charges, although they could acquit him of both. The fact that the members acquitted Appellant of Additional Charge III but convicted him of Additional Charge V lends credence to our belief that the members did understand and follow the Military Judge's instructions. We also are satisfied that allowing the members to consider both charges in the order in which he instructed did help to avoid confusion. In these circumstances, we find no abuse of discretion.

V.

THE DISHONORED CHECK OFFENSES

Appellant originally was charged under Article 123a, UCMJ, with one specification each of making three checks with intent to defraud. A copy of the Charge Sheet was served properly on Appellant prior to trial. Before arraignment, each specification was amended to charge a violation of Article 134, UCMJ, for making and uttering the checks and thereafter dishonorably failing to maintain sufficient funds for payment upon presentation. Each specification was amended by the Trial Counsel who made "pen and ink" changes. In so doing, however, he failed to include the word, "dishonorably," in the amended specifications. Appellant now maintains that each specification fails to state an offense and that his conviction under the charge and each specification should be set aside.

"A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3). *See also United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202 (1953). Appellant does not contend that the original Article 123a, UCMJ, specifications were drafted incorrectly, and our own review confirms that each satisfies the requirements of R.C.M. 307(c)(3).

¶ 49d.(1), Part IV, MCM, provides that the making and uttering of a check and dishonorably failing thereafter to maintain sufficient funds is a lesser included offense under Article 123a, UCMJ. It is clear from the record that Appellant had been apprised properly of the greater offenses, *i.e.*, those alleged under Article 123a. It also is apparent that he had been involved in informal negotiations which led to the government's decision to charge him with only the lesser included offenses under Article 134, UCMJ. In such circumstances, we have no trouble concluding that Appellant has suffered no harm and is not entitled to relief for the government's failure to include the word, "dishonorably," in the three Article 134, UCMJ, specifications. *Cf. United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986)(An unauthorized absence specification missing the words, "without authority," is defective, although not fatally so).

Appellant next contends that the Military Judge erred in admitting Prosecution Exhibit 10, a copy of three bank statements for his account dated 17 December 1991, 17 January 1992, and 18 February 1992, respectively. He argues that, inasmuch as the three dishonored checks were issued on 3, 9, and 12 January 1992, and presented for payment between those dates and 14 January 1992, the December and February statements should have been excluded under Rule 402, Military Rules of Evidence [hereinafter Mil.R.Evid]. Appellant also argues the February statement should have been excluded under Mil.R.Evid. 403 and 404(b) because it indicates the existence of other dishonored checks.

In attempting to prove Appellant's guilt of the three dishonored check offenses, the government was required to demonstrate that his failure to place or maintain sufficient funds in his checking account "was dishonorable." ¶ 68b.(4), Part IV, MCM. "Mere negligence in maintaining one's bank

balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

The Military Judge admitted Prosecution Exhibit 10 over defense objection.[3] In so doing, he stated that "I find that the February statement is probative of the Accused's attitude toward his . . . checking account during the period in question and is probative of whether or not that attitude was grossly indifferent or grossly negligent or whether or not his conduct with respect to that bank account was dishonorable." Record at 106, Vol. III. Later, he gave a limiting instruction on the use of Prosecution Exhibit 10, specifically admonishing the members to use the February statement

> for the limited purpose of its tendency, if any, to show the accused's state of mind or attitude with respect to the handling of his checking account transactions. . . .
>
> You may not, and I repeat, you may not, use this evidence to conclude that the accused somehow is a

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[3] The record is unclear as to the precise nature of Appellant's objections to admission of this exhibit at trial. The defense first made known its objection to the exhibit during a session conducted pursuant to Article 39(a), UCMJ. The next morning, an "off the record" conference was conducted by the Military Judge pursuant to R.C.M. 802. Back on the record, the Military Judge later alluded to this conference and Appellant's stated intention to object to admission of Prosecution Exhibit 10, but did not state the basis for the objection. It does appear that Appellant's sole objection was to the February bank statement and that it was based upon Mil.R.Evid. 404(b). Were this the case, we would deem waived Appellant's current assertions under Mil.R.Evid. 402 and 403 and his objection to the December statement. As it is not certain, we shall treat this issue as though Appellant did object to both the December and February statements and did cite all three Rules of Evidence at the time he initially objected.

> bad person, and that, therefore, he must be guilty of these offenses that are charged with respect to the bad checks, or that he is a bad person and therefore he must be somehow guilty of the other offenses with which he is charged.

Record at 135–136, Vol. IV.

We have reviewed the December, January, and February statements ourselves. The December statement reveals one instance when Appellant overdrew his account by issuing a check when he had insufficient funds. The February statement reveals that Appellant not only overdrew his account, but that he had four "returned check charge[s]" between 24 and 30 January 1992. The January statement, which Appellant does not contest, reveals that Appellant had four other "returned check charge[s]," apparently including the three for which he was convicted.

We do not find that the Military Judge abused his discretion in admitting all three statements. The December statement was at least minimally relevant under Mil.R.Evid. 402 to demonstrate that Appellant had issued at least one check which would have overdrawn his account but for the "overdraft protection" which his bank then was willing to extend to him. The February statement was relevant in showing a continuing pattern, which first began in late December of 1991, of Appellant's issuing checks without having sufficient funds to cover them. Under Mil.R.Evid. 404(b), the February statement was admissible to demonstrate the "absence of mistake or accident" on the part of Appellant, as well as his apparent lack of concern about maintaining a sufficient balance in his checking account. *Cf. United States v. Ferguson*, 29 M.J. 559 (A.F.C.M.R. 1989)(In circumstances similar to these, "'attitude' becomes one of the 'other purposes' for which uncharged misconduct is admissible under

Mil.R.Evid. 404(b)." *Id.* at 561). Finally, under Mil.R.Evid. 403, we do not believe that the probative value of Prosecution Exhibit 10 was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Appellant's final assertion with respect to the three dishonored check charges is that the government failed to present adequate evidence to prove, beyond a reasonable doubt, two of the five elements of dishonorable failure to maintain sufficient funds, viz., that his failure to maintain sufficient funds was dishonorable, ¶ 68b.(4), Part IV, MCM, and that his conduct was prejudicial to good order and discipline, ¶ 68b.(5), Part IV, MCM. We disagree.

The test for legal sufficiency is whether, considering the evidence in a light most favorable to the government, the trier of fact rationally could find the existence of every element of the alleged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for our not having observed the witnesses personally, we are convinced of Appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

The Navy–Marine Corps Court of Military Review recently had occasion to address the sufficiency of the evidence issue in two cases involving the failure to maintain sufficient funds. We find our sister Court's disscussions of the issues particularly instructive and helpful. *See United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993); *United States v. Hurko*, 36 M.J. 1176 (N.M.C.M.R. 1993).

> A charge of dishonorably failing to maintain funds requires some act of deceit, wilful evasion, bad faith,

> false promises, or other distinctly culpable circumstances showing a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. The gist of the offense of dishonorably failing to maintain funds lies in the conduct of the accused *after* uttering the instrument, conduct which must reflect bad faith or gross indifference. (citations omitted).

*United States v. Wright*, *supra*, slip op. at 5.

In *Wright*, the Court set aside a guilty plea to an insufficient funds charge because the providence inquiry established that the accused, who knew at the time he issued the checks that he did not have sufficient funds, had intended to deposit money to cover them by the time of presentment to his bank. The Court went on to note that

> *Simple negligence, inadvertence or indifference in maintaining sufficient funds is not an offense in military law*. [The accused's] inability to cover the checks may have been caused by a negligent reliance on [an unnamed] source, not a dishonorable refusal to cover the checks, or even unforeseen events that could not reasonably have been foreseen. (citations omitted) (emphasis added).

*Id*. slip op. at 6.

In *United States v. Hurko*, the Navy–Marine Corps Court faced a similar situation involving the issuance of numerous checks over a short period of time, all of which were dishonored. In this case, however, the evidence established that the accused did have a named source who was supposed to have deposited funds into his account, *i.e.*, his wife. The Court set aside the findings of guilty of the first 20 dishonorable failure to maintain sufficient funds

specifications, but affirmed 34 other similar specifications. The Court held that the accused's belief that his wife would deposit sufficient funds to cover the first 20 checks was "reasonable, and no evidence was introduced that challenged the reasonableness of his belief. . . . His blind reliance on [his wife was] . . . certainly careless and irresponsible but cannot be described as dishonorable." 36 M.J. at 1178.

In affirming the remaining specifications, the Court found it

> inconceivable that the [accused] could have believed that those subsequent checks would be covered. . . . Considering the sheer volume of checks written (36 for $ 3362.00) in a short period of time (26 days) and the absence of any possibility of a new source of funds to cover these checks, we find the evidence sufficient to prove that the [accused] wrote all [the remaining] checks . . . knowing they would not be honored and with intent to defraud.

*Id.* at 1179.

In the present case, the evidence reveals that Appellant had made an Automatic Teller Machine (ATM) inquiry on 26 December 1991, which advised him that he had $3.44 in his account. Between that date and 2 January 1992, $595.17 was deposited into his account, leaving a total of $598.61 available to be drawn against. Appellant issued ten checks totalling $559.53 and withdrew $188.00 from an ATM without having made any additional deposits. Three of these checks, each of which was dishonored, were the ones for which he was charged. The total of all the checks and withdrawals was $747.53. Accordingly, Appellant attempted to "overdraw" his account by $148.92. There was no evidence that Appellant's bank was willing to permit such a substantial overdrawing of his account. Appellant's only explanation at trial was that he believed he "did have money in there to cover it."

Unlike the situation in either *United States v. Wright* or *United States v. Hurko*, *supra*, Appellant could not have held a *reasonable* belief that *all* of the checks would be honored. At best, the most he might have hoped for was that some of them might not be presented for payment before he could make his next deposit. Such an attitude goes well beyond "simple negligence, inadvertence or indifference in maintaining sufficient funds," *United States v. Wright*, (N.M.C.M.R. Dkt. No. 91 0329 7 April 1993) unpublished slip op. at 6, and does reflect "bad faith or gross indifference in this regard." ¶ 68c., Part IV, MCM.

Appellant argues that, in any event, his conduct was not to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces. This argument is premised upon the testimony of the Exchange Officer at the Coast Guard Exchange where the three checks had been cashed, who did state that these were three of many which had been dishonored, Appellant ultimately made good on them, and returned checks were a normal part of doing business. However, the Exchange Officer also testified that such dishonored checks create cash flow problems for the exchange, and, if never paid, decrease the profits of the Exchange and, ultimately, the amount which the Exchange can contribute to the Morale Fund. We are satisfied that this testimony adequately establishes both conduct to the prejudice of good order and discipline, ¶ 60c.(2)(a), Part IV, MCM, and conduct of a nature to bring discredit upon the armed forces, ¶ 60c.(3), Part IV, MCM. We reject Appellant's "cost of doing business" argument. It would, were we to agree with it, effectively allow an "open season" on the funds of the Coast Guard Exchange System.

Accordingly, we find the evidence legally and factually sufficient to support Appellant's convictions for dishonorably failing to maintain sufficient funds.

## VI.

## ACTION

The remaining asserted issues are resolved adversely to Appellant. We independently have reviewed the appropriateness of the sentence, *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982), and find it appropriate. Accordingly, the findings and the sentence, as approved below, are affirmed.

Chief Judge BAUM and Judge BASTEK concur.